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No. 01-1500

IN THE

Supreme Court of the United States

Erick Cornell Clay,

Petitioner,

v.

United States of America,

Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the Seventh Circuit

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

Petitioner's opening brief and the opening brief of the United States demonstrated that the one-year statute of limitations to file a motion under 28 U.S.C. 2255 runs from the conclusion of direct review or the expiration of time to seek such review. That interpretation, which has been adopted by the clear majority of circuits, comports with the parallel terms of 28 U.S.C. 2244 as well as the definition of "final" employed by this Court in the collateral review context. *Amicus* offers basically two arguments in response, both of which are flawed.

First, *Amicus* points to other contexts (principally Fed. R. Crim. P. 33 and the Speedy Trial Act) in which "final" has a different meaning. The simple answer, however, is that Section 2244 and this Court's collateral review precedents provide much closer analogies to Section 2255 than do the alternative contexts *Amicus* identifies. Moreover, *Amicus*'s interpretation conflicts with the view of every circuit to address the issue, for it would mean that the time to seek post-conviction review under Section 2255 runs from the issuance of the appellate mandate even when the defendant does seek certiorari on direct review.

Second, *Amicus* argues that the majority "reading of § 2255 and § 2244 is impossible" (*Amicus* Br. 4) and "would have the Court amend" the statute (*id.* at 8) in light of the so-called "*Russello* presumption." But that tool of construction is inapposite when, as here, a particular term appears in multiple provisions but is defined in only one. Instead, the provisions should be read *in pari materia* absent a contrary indication of congressional intent, which does not exist in this case. *Amicus* cites without any substantial discussion nine cases applying the *Russello* presumption; each is inapposite.

I. The Logical Sources For Interpreting The Term "Final" In Section 2255 Are Section 2244 And This Court's Collateral Review Precedents.

1. The limitation period that Congress set forth in Section 2244 for state prisoner habeas petitions under 28 U.S.C. 2254 is

more analogous – indeed, on any fair reading, *much* more analogous – than the examples offered by *Amicus* in which the courts have given "final" a different meaning. Petitioner's opening brief showed that Congress intended applications for post-conviction relief under Sections 2254 and 2255 generally to operate similarly. See Pet. Br. 3 (citing *Hill* v. *United States*, 368 U.S. 424 (1962)). It is settled that "§ 2255 was intended to afford federal prisoners a remedy identical in scope to federal habeas corpus," such that "there can be no doubt that the grounds for relief under § 2255 are equivalent to those encompassed by § 2254" and "§ 2255 was intended to mirror § 2254 in operative effect." *Davis* v. *United States*, 417 U.S. 333, 343-45 (1974).

Congress furthermore in the AEDPA formulated the one-year limitation periods of those provisions in almost identical terms. *Amicus* agrees that the provisions are "otherwise analogous (and virtually identical)." *Amicus* Br. 4. "For the most part, § 2244's one-year limitation period closely parallels the period set forth in § 2255. Each provision describes four possible dates and provides that the limitation period shall run from the latest of those dates. The provisions' descriptions of three of those four dates * * * are virtually identical * * *." *Id.* at 9.

Congress straightforwardly distinguished direct and collateral review in Section 2244. Consistent with this Court's precedents, Congress adopted a rule under which the deadline to bring a collateral attack commences when proceedings conclude in this Court on direct review or the time to seek certiorari expires. See Pet. Br. 14-16 (collecting cases); S.G. Open. Br. 16-19 (collecting cases); see also *Brecht* v. *Abrahamson*, 507 U.S. 619, 634 (1993); *Bradley* v. *School Bd. of Richmond*, 416 U.S. 696, 711 n.14 (1974). When that period expires, the judgment cannot be overturned on direct review and it has become "final" in the sense of "allowing no further doubt or dispute" (THE NEW OXFORD AMERICAN DICTIONARY 633 (2001)). It makes no difference that these precedents were "derive[d] from 'basic norms of constitutional adjudication'" (*Amicus* Br. 6 (quoting *Griffith* v. *Kentucky*, 479 U.S. 314, 322 (1987))) because this Court has consistently applied the same rule – under which the time to seek certiorari is counted in determining finality – whenever it

distinguishes direct from collateral review. Contrary to *Amicus*'s contention, these precedents are not limited to the retroactivity context but stand for the general proposition that, "[w]hen the process of direct review – which, if a federal question is involved, includes the right to petition this Court for a writ of certiorari – comes to an end, a presumption of finality and legality attaches to the conviction and sentence." *Barefoot* v. *Estelle*, 463 U.S. 880, 887 (1983).

Furthermore, absent some contrary indication in the text or legislative history, it is logical to conclude that Congress intended "final" to have the same meaning in Section 2255 as in Section 2244 and this Court's collateral review precedents. A single, uniform interpretation of the term has the considerable advantage of clarity, which is a cherished commodity in modern post-conviction litigation, particularly given that many applications are filed *pro se*. "[T]he most important thing is simply to have an established and uniform rule * * *." *Amicus* Br. 48. Yet on *Amicus*'s view, a federal prisoner is expected to know and appreciate that his judgment of conviction does *not* "become final" for purposes of the retroactive application of this Court's precedents until the time to seek certiorari expires, yet it *does* "become final" for purposes of the filing of his Section 2255 motion upon the issuance of the appellate mandate.

Amicus may be correct that "there are reasons why Congress would treat *claims* under § 2255 and § 2254 (to which § 2244 relates) differently" in some respects. *Amicus* Br. 41 (emphasis omitted; second emphasis added). The relevant point, however, is that this possibly differential treatment of "claims" is unrelated to the running of the statute of limitations. *Amicus* thus has no theory for why Congress would give state habeas petitioners who do not seek certiorari the full benefit of the time to seek review in this Court, but would apply a different rule for federal prisoners. Whether or not "courts considering § 2255 motions can provide a broader range of relief" and "a federal prisoner generally may only raise claims in a § 2255 motion that were *not* already considered on direct appeal" (*Amicus* Br. 42), those points simply have nothing to do with the time for filing post-conviction applications in federal district court.

Nor is *Amicus* correct that "a state prisoner may not seek a writ of habeas corpus from a federal court until the time has expired for the state prisoner to file a petition for certiorari on direct review," or that such a practice (to the extent it exists) is "not implicated by motions under § 2255." Contra *Amicus* Br. 42, 44. According to *Amicus*, when a federal prisoner decides not to seek certiorari and instead "to proceed directly to litigate other claims under § 2255 before the very same district court that originally entered judgment," "interests of federalism and comity do not provide a reason to require the defendant to wait to file the § 2255 claim until the time expires to file a petition for certiorari on direct review." *Id.* at 44 (emphasis omitted). But that is equally true under Section 2254, and it therefore provides no basis for concluding that Congress intended a different limitation period here: if a state prisoner does not seek certiorari in this Court, "federalism and comity" do not counsel in favor of adding to the one-year limitation period the period of time during which the prisoner could have sought review here.[1]

The bottom line, then, is that the obvious place to look for the meaning of the phrase "judgment of conviction becomes final" in Section 2255 is the indistinguishable limitation provision of Section 2244. The few examples that *Amicus* offers of instances in which courts have given "final" a different interpretation are thus largely immaterial. *Amicus* does not contend that any of them provide a better analogy than Section 2244 and, as petitioner shows *infra*, each is properly distinguished.

2. Before addressing the instances *Amicus* identifies in which "final" has been given a different meaning, it is important to recognize the consequence each of those examples has in common. According to *Amicus*, the period to file a motion un-

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[1] In any event, *Amicus*'s assertion that, notwithstanding *Fay* v. *Noia*, 372 U.S. 391 (1963), "federal courts still generally do require a state prisoner to wait until the time has expired for filing a petition for certiorari on direct review before litigating a petition for habeas corpus" (*Amicus* Br. 43) reflects at most a sensible, pragmatic view that collateral review should await the conclusion of direct review. The same rationale applies under Section 2255.

der Section 2255 is *not* tolled when, in contrast to this case, a defendant *does* seek certiorari in this Court. Refusing to commence the limitation period upon issuance of the appellate mandate, he explains, is "contrary to the established interpretation of analogous provisions of Rule 33 and the Speedy Trial Act." *Amicus* Br. 7. *Amicus* has thus set himself at odds with every court of appeals to have considered the issue, all of which rightly hold that the one-year period does not begin until the denial of certiorari because Congress could not have intended to require federal prisoners to commence Section 2255 proceedings while it is uncertain whether their convictions even stand. See Pet. Br. 12; S.G. Open. Br. 14 & n.3.[2]

Amicus notes that, "traditionally, a 'final judgment' is one that is final and appealable." *Amicus* Br. 28-29 (quoting *Melkonyan* v. *Sullivan*, 501 U.S. 89, 95 (1991)). But the statute of limitations under Section 2255 does not run from the entry of a "final judgment" (which is an established term of art) and there is nothing "unusual" (contra *id.* (quoting *Melkonyan*, 501 U.S. at 95)) or "*atypical*" (contra *id.* at 41 (emphasis in original)) about the conclusion that a judgment of conviction "becomes final" (§ 2255 para. 6(1)) once there no longer is a prospect it will be overturned on appeal. To the contrary, even *Amicus* presumes that the limitation period of Section 2255 does not begin to run when a district court enters a "final judgment" in the traditional sense, for he agrees that the limitation period does not com-

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[2] *Amicus* does offer that it might be possible to regard the limitation period as "tolled" while a certiorari petition is pending. But he candidly acknowledges that this suggestion is deeply problematic. Congress provided for tolling under the expedited procedures of 28 U.S.C. 2263 (see § 2263(b)); if the *Russello* presumption applies in this context, then it logically applies to preclude the availability of tolling as well. See *Amicus* Br. 21. Further, the requests for relief that toll a judgment's finality (such as motions for reconsideration) are "filed in the court that rendered the judgment" (*id.* at 34) in contrast to, for example, a certiorari petition in this Court. Indeed, the very point of those cases is that such a request precludes the judgment from becoming final and thus appealable.

mence until review of that judgment has concluded on appeal. Otherwise, the limitation period would run during the pendency of an appeal as of right, despite the uniform view acknowledged by *Amicus* (at 44-45 n.22) that a Section 2255 motion may not be filed at that time. See also S.G. Open. Br. 22 & n.7. Sections 2244 and 2255 thus necessarily use the term "judgment" as itself encompassing "[a] court's *final* determination of the rights and obligations of the parties in a case" (BLACK'S LAW DICTIONARY 846 (7th ed. 1999) (emphasis added)).

Despite the fact that Section 2255 does not refer to a "final judgment," *Amicus* also places considerable weight on Federal Rule of Criminal Procedure 33, which required, prior to its amendment in 1998, that any motion for a new trial based on newly discovered evidence be filed "before or within two years after *final* judgment." Fed. R. Crim. P. 33 (pre-Dec. 1, 1998 version) (emphasis added). In interpreting this provision, the courts of appeals have given the additional meaning of "judgment" (*i.e.*, the entry of the district court's judgment), reading instead to mean the Rule's entry of the appellate judgment's entry date. See *Amicus* Br. 22-23.

Even assuming that the courts of appeals correctly interpreted Rule 33 (a question that has never reached), *Amicus*'s reliance on it is misplaced. As explained, there is an important conceptual difference between the entry of a final judgment and the date on which a judgment "becomes final." Further, the policy consideration animating the strict limitation period of Rule 33 – that the evidence underlying the conviction not become stale prior to a new trial (see *Bean* v. *United States*, 679 F.2d 681, 685 (CA7 1982)) – is not central under Section 2255. It is therefore not surprising that Rule 33's period is jurisdictional (see, *e.g.*, *United States* v. *Fowler*, 256 F.3d 741, 743 (CA5 2001) (per curiam)), while the Section 2255 period is subject to equitable tolling (*Amicus* Br. 35-36 n.16 (citing cases)).[3]

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[3] *Amicus*'s assertion that Rule 33 reflects a settled interpretation of "final judgment" because "[c]ourts uniformly held that [the Rule's] time was triggered when the Court of Appeals issued its mandate of affirmance" (Br. 22-23) is belied by the Advisory Committee Notes to the Rule's 1998 amendment, which explain that the amendment was adopted in part because it was unclear whether the bar was triggered by "the appellate court's judgment or the issuance of its mandate." Fed. R. Crim. P. 33 Adv. Comm. Notes.

Amicus's further assertion that "Congress indicated that it sought to enact a statute of limitations under § 2255 that would be comparable to the time bar that existed under [the pre-Amendment] version of Rule 33" (Br. 22 n.6), seriously overstates a 1983 report stating that the addition of a statute of limitations to Section 2255 would "bring[] the availability of collateral relief into conformity with the approach taken by federal courts" (S. Rep. No. 98-226, at 9-10 (1983)). The report's statement that the limitation period "runs when all time remedies on direct review are exhausted or the time for seeking direct review has expired" (*id.* 30). See S.G. Open. Br. 22 n.6.

Amicus also points to the Speedy Trial Act, which provides that the time to subject a defendant to trial or retrial "shall commence within seventy days from the date the action occasioning the trial [or retrial] becomes final." 18 U.S.C. 3161(d)(2), 3161(e). *Amicus* notes the rule that "an *appellate disposition* occasioning a retrial becomes final on the date when the appellate court issues its mandate." *United States* v. *Kington*, 875 F.2d 1091, 1109 (CA5 1989), *quoted in Amicus* Br. 26 (emphasis added; emphasis omitted). Thus, when a court of appeals' decision subject to the Act requires the retrial of a criminal defendant, the statute expressly provides that the limitation period runs from the appellate ruling, which is the "action occasioning the trial [or retrial]."[4]

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[4] The distinction between the "court of appeals' judgment" and the "judgment of conviction" also explains why *Amicus* is wrong to emphasize that, "under the most natural understanding of the words, the judgment *of the Court of Appeals* affirming petitioner's conviction" is the "final judgment" for purposes of the time

Once again, the text and policies of Section 2255 are different. An appellate court's judgment *overturning* a conviction (the scenario to which *Amicus* refers under the Speedy Trial Act) cannot on any reading be regarded as a "judgment of conviction" (the language of Section 2255). The Speedy Trial Act must look to the appellate mandate because, "[s]imply put, jurisdiction follows the mandate" and the retrial cannot commence until the case returns to the district court. *United States* v. *Rivera*, 844 F.2d 916, 921 (CA2 1988), *cited in Amicus* Br. 26.[5] Finally, the shorter time period under the Speedy Trial Act exists for the benefit of the defendant, not the government, which otherwise would have the opportunity to delay the retrial by seeking certiorari to review the appellate court's judgment overturning the conviction. Courts accordingly hold that it is not "necessary for *the government*'s time to petition for certiorari to expire." *Amicus* Br. 27 (emphasis added).

II. This Case Is Controlled By The Canon That Statutory Terms Should Be Read *In Pari Materia* Rather Than By The *Russello* Presumption.

1. Given the clear parallels between the limitation provisions of Sections 2244 and 2255, the controlling principle of statutory construction in this case is that a "term should be construed, if possible, to give it a consistent meaning throughout the Act. That principle follows from our duty to construe statutes, not isolated provisions." *Gustafson* v. *Alloyd Co.*, 513 U.S. 561, 568 (1995). "The burden" is on "the proponents of the view that [a term] means one thing in [one provision] and another in [a later provision] to adduce strong textual support for that conclusion." *Id.* at 573. The force of the *in pari materia* canon is at its

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Amicus Br. 31 (first emphasis added). See also *id.* at 35. The finality of the appellate judgment is irrelevant to Section 2255.

[5] For this reason, some courts looked to the receipt of the mandate by the district court rather than its issuance by the court of appeals (see *Amicus* Br. 27 n.9), a divergence in authority that belies *Amicus*'s assertion that "final" has a single, generally accepted meaning.

strongest when, as in this case, two statutes are enacted simultaneously. See Pet. Br. 20; S.G. Open. Br. 20 (collecting cases).

Burnet v. *Guggenheim*, 288 U.S. 280 (1933), is instructive. *Burnet* held that a tax on "the transfer * * * by gift * * * of any property" was triggered, in the context of a trust, at the time the trust became irrevocable rather than the earlier date on which the trust was established. The gift tax statute did not define "transfer * * * of any property," so the Court looked to the parallel provisions of the estate tax, which were triggered by any revocable trust – *viz.*, any trust "where the enjoyment thereof was subject * * * to any change through the exercise of a power [by the decedent] * * * to alter, amend, or revoke." The Court specifically rejected the taxpayer's argument that the absence of a parallel provision in the gift tax gave rise to the negative inference that Congress did not intend to tax revocable trusts in that context:

> [The respondent] asks why * * * a provision should have been placed in [the estate tax] and nothing equivalent inserted in [the gift tax], if powers for purposes of the one tax were to be treated in the same way as powers for the purposes of the other. * * * No doubt the draftsman of the statute would have done well if he had been equally explicit in the drafting of [the gift tax]. This is not to say that meaning has been lost because extraordinary foresight would have served to make it clearer. Here as so often there is a choice between uncertainties. We must be content to choose the lesser.

Id. at 287-88. See also *Estate of Sanford* v. *Commissioner*, 308 U.S. 39, 42-44 (1939) (same); cf. *Allied Chem. & Alkali Workers* v. *Pittsburgh Plate Glass Co.*, 404 U.S. 157, 185 (1971) (construing definitions of duty to bargain collectively *in pari materia*).

2. This case is not controlled, as *Amicus* contends, by the so-called "*Russello* presumption," under which courts give effect to Congress's use of distinct language in two related or parallel statutory provisions. The text simply does not give rise to a negative inference that Congress intended to preclude Section 2255 from being interpreted in light of the meaning of "final"

codified in Section 2244. As *Amicus* explains (at 13), "Section 2255 refers to the moment when a federal prisoner's conviction 'becomes final,' and elaborates no further * * *." No meaningful negative inference arises from the fact that Congress did not define "final" *at all* in Section 2255 but did provide a definition in Section 2244.

The *Russello* presumption might apply if, for example, Congress had defined final in Section 2255 in a more limited fashion than in Section 2244. For example, imagine that the limitation period in Section 2255 ran from the date the "judgment becomes final by the conclusion of direct review." In that hypothetical circumstance, a habeas petitioner would have difficulty arguing that "the conclusion of direct review" included the time to seek certiorari in this Court. The petitioner's argument would be textually plausible, but it would be in considerable tension with Section 2244, which expressly distinguishes "the conclusion of direct review" from "the expiration of the time for seeking such review."

But anything less than such a clear contrast does not give rise to the *Russello* presumption in the context of these provisions of the AEDPA. As *Amicus* explains (at 15), *Russello* rests on the "presumption that Congress does act carefully and thoughtfully when it drafts statutes." But technical and refined contrasts between Sections 2244 and 2255 should not be read to give rise to negative inferences. The limitation period of Section 2255, for example, is measured from the time the "judgment of conviction" "becomes" final; Section 2244, by contrast, runs from the time the "judgment" "became" final. Untempered application of *Russello* would require attributing significance to both of these distinctions, an implausible result.

There are other examples as well. Petitioner's opening brief (at 23) identified, and *Amicus* simply ignores, instances in which Section 2255 implicitly cross-references and incorporates the provisions of Section 2244. For example, Section 2255 does not even expressly prohibit federal prisoners from filing second or successive applications, which are precluded only by incorporation of Section 2244(b)(1). Further, Section 2255 para. 8(1)'s discussion of newly discovered evidence impliedly incorporates

the more stringent provision of Section 2244(b)(2)(B)(i) that "the factual predicate for the claim could not have been discovered previously through the exercise of due diligence." Accepting *Amicus*'s argument, by contrast, would require drawing negative inferences from the failure of Congress to include all the terms of Section 2244 in Section 2255.

If anything, this case presents a particularly inappropriate circumstance to draw the *Russello* presumption, for there is a perfectly plausible explanation for Congress's decision to include a definition of "final" in Section 2244 but not in Section 2255. Thus, even if the *Russello* presumption otherwise applied, it would be overcome in this case, particularly given the logical parallel between the limitation provisions of Sections 2244 and 2255. The limitation period of Section 2244 is triggered by state court proceedings, which are governed by varying conceptions of "finality." See Pet. Br. 22. Cf. *Duncan* v. *Walker*, 533 U.S. 167, 177 (2001) (recognizing that Congress may have used the term "post-conviction or other collateral" "in recognition of the diverse terminology that different States employ to represent the different forms of collateral review that are available after a conviction"). *Amicus* suggests (at 11) that a federal definition of "final" would be applied in any event. But the suggestion that there is an immutable principle that federal law controls – such that it was entirely unnecessary to include a definition even in Section 2244 – is incorrect, for there are many instances in which "federal courts should 'incorporate state law as the federal rule of decision.'" *Kamen* v. *Kemper Fin. Servs.*, 500 U.S. 90, 98 (1991) (quoting *United States* v. *Kimbell Foods*, 440 U.S. 715, 728 (1979)). Thus, although *Amicus* (at 11-12) cites *Dickerson* v. *New Banner Institute*, 460 U.S. 103 (1983), for the proposition that federal law determines the meaning of "conviction" for purposes of federal firearms statutes, he fails to recognize that Congress specifically overturned that holding in 18 U.S.C. 921(a)(20), which looks to state law. See *Caron* v. *United States*, 524 U.S. 308, 312-13 (1998).

Furthermore, application of the *Russello* presumption in this case would produce a result that not even *Amicus* defends: it would require construing "final" in Section 2255 to exclude *both*

of the two periods identified in Section 2244: "the conclusion of direct review or the expiration of time for seeking such review." Without elaboration, *Amicus* contends that "it would have made no sense for Congress to have written the statute to say that the limitation period in § 2244 runs from 'the date on which the judgment became final or the expiration of time for seeking direct review.'" *Amicus* Br. 5. But why is that so? If *Amicus* were correct that the first clause – "the judgment became final" – means "the issuance of the mandate," the formulation that he characterizes as nonsensical would identify two different points in time and would thus be perfectly plausible. Moreover, that formulation in Section 2244 would be a substantially stronger candidate for the application of the *Russello* presumption to Section 2255, which refers more narrowly to the date on which the judgment of conviction "becomes final."

Alternatively, *Amicus* would reformulate the presumption so that "mutual exclusivity is not in any way a precondition of *Russello*; rather, the difference between the language of the provisions reflects a *difference* in scope – the two provisions cannot have exactly the same meaning." *Amicus* Br. 20. Even accepting that view, *Amicus* simply assumes his own conclusion. He posits that Congress implicitly intended to incorporate one of the two phrases in Section 2244 – "the conclusion of direct review or the expiration of time for seeking such review" – and further assumes that it was the former rather than the latter. But, given this Court's decisions interpreting "final" in the collateral review context, it is equally plausible that Congress intended to incorporate the *latter* phrase and to defer the commencement of the limitation period for filing a collateral attack until direct review is completed.

3. It is therefore not surprising that each of the nine precedents *Amicus* cites without discussion is inapposite. None involves the application of the *Russello* presumption in the circumstances of this case: Congress's simultaneous enactment of two provisions with a common phrase, only one of which contains a definition. Furthermore, this Court has never, as *Amicus* proposes in this case, used the *Russello* presumption as its sole source of statutory interpretation. Each time the presumption

has been applied, it has supplemented other indicia of Congress's intent.

***Russello* v. *United States*, 464 U.S. 16 (1983)**, itself held that a forfeitable "interest" under RICO includes insurance proceeds secured by fraud. The relevant statute provided for forfeiture of "any *interest* [the petitioner] has acquired or maintained in violation of [RICO]." 18 U.S.C. 1963(a)(1) (emphasis added). This Court reasoned principally that "[t]he ordinary meaning of 'interest' surely encompasses a right to profits or proceeds," because that term is generally defined as "[t]he most general term that can be employed to denote a right, claim, title, or legal share in something." 464 U.S. at 21 (quoting BLACK'S LAW DICTIONARY 729 (5th ed. 1979)). The statute's legislative history, moreover, reflected a congressional intent to give RICO's forfeiture provision a wide scope. *Id.* at 26-28.

The Court specifically rejected the petitioner's argument that "interest" must mean "an interest in" some identifiable thing, and "an interest in an 'enterprise'" in particular. 464 U.S. at 22. The Court reasoned: "Every property interest, including a right to profits or proceeds, may be described as an interest in something." *Id.* The petitioner's argument was furthermore contradicted by the "evolution" of the statute, which as originally drafted referred to "all interest in the enterprise," but which was later amended to remove this limitation. *Id.* at 23-24.

In the portion of the opinion that has been cited for the "*Russello* presumption," the Court found its conclusion "that the language of the statute plainly covers the insurance proceeds petitioner received as a result of" his fraud to be "fortified" by the contrast between the provision at issue, Section 1963(a)(1), and Section 1963(a)(2). 464 U.S. at 23. The latter provision did not "define" the term "interest," but rather used the very terminology – interest in an enterprise – that the petitioner sought to invoke. "The former speaks broadly of 'any interest * * * acquired,' while the latter reaches only 'any interest in * * * any enterprise which [the defendant] has established[,] operated, controlled, conducted, or participated in the conduct of, in violation of [RICO].'" *Id.* (first and second alterations in original). "Had Congress intended to restrict § 1963(a)(1) to an interest in

an enterprise, it presumably would have done so expressly as it did in the immediately following subsection (a)(2)." *Id.*

***Barnhart* v. *Sigmon Coal Co.*, 534 U.S. 438 (2002)**, held that the respondent coal companies did not owe health benefits to retired miners who had worked for the companies' predecessors. The respondents were successors in interest to "signatory operators" – companies that had signed any one of a series of agreements requiring contributions to provide benefits to retired coal miners. The Coal Industry Retiree Health Benefit Act of 1992 (Coal Act), 26 U.S.C. 9701 *et seq.*, required a company to pay for a retiree's health benefits if the company was either a "signatory operator" or – if the "signatory operator" was no longer in business – a "related person" to a signatory operator. 26 U.S.C. 9706(a). Under the Coal Act, "'a person shall be considered to be a related person to a signatory operator if that person' falls within one of three categories." 534 U.S. at 451 (quoting 26 U.S.C. 9701(c)(2)). The Court reasoned that because the respondent company did "not fall within any of the three specified categories defining a 'related person,'" it was not liable to pay health benefits under the Coal Act. *Id.* at 452.

After relying on the text's plain meaning, the Court added: "Nor should we infer" that Congress meant the three categories to cover the company in question, because "[w]here Congress wanted to provide for successor liability in the Coal Act, it did so explicitly, as demonstrated by other sections in the Act that give the option of attaching liability to 'successors' and 'successors in interest.'" 534 U.S. at 452-53. Citing a statute providing "that '*for the purposes of* [*Individual Employer Plans*]' * * * 'the term "last signatory operator" shall include a successor in interest of such operator,'" the Court explained, "Congress gave 'last signatory operator' a *subsection-specific definition* that extends the IEP obligations of a preenactment signatory operator to include its 'successors in interest.'" *Id.* at 453 (quoting 26 U.S.C. 9711(g)(1)) (emphasis added). The Court reasoned: "Those subsections stand in direct contrast to the provisions implicated here: §§ 9701(c)(1), (2), and (4) *which define* 'signatory operator,' 'related persons,' and 'last signatory operator,' respectively, '*for [the] purposes of this section*,' and *do not* specify that they include or impose liability on the signatory operator's successor in interest." *Id.* at 453-54 (first two emphases added).

***Beach* v. *Ocwen Federal Bank*, 523 U.S. 410 (1998)**, held that the Truth in Lending Act extinguishes the defense of rescission in foreclosure actions three years after the consummation of the transaction. The petitioners claimed that their bank, which was trying to foreclose on their house, had unlawfully concealed information from them, and they sought to defend against the foreclosure by claiming a right to rescind the mortgage agreement on the ground that the bank had failed to make disclosures required by the Act. The bank argued that the Act prohibited all claims for rescission made more than three years after the transaction, whereas the petitioners argued that a *defense* of rescission was not barred. The Act states that "the borrower's right of rescission 'shall expire three years after the date of consummation of the transaction.'" 523 U.S. at 413 (quoting 15 U.S.C. 1635(f)). Noting that "the answer is apparent from the plain language of § 1635(f)," this Court concluded that the section "talks not of a suit's commencement but of a right's duration, which it addresses in terms so straightforward as to render any limitation on the time for seeking a remedy superfluous." *Id.* at 416-17.

Only then did the Court go on to contrast with Section 1635(f) another section of the Act: "The Act, however, has left even less to chance (if that is possible) than its 'expire' provision would allow, standing alone." 523 U.S. at 417. Section 1640 authorizes borrowers to bring an action for recoupment of mortgage payments within one year of the transaction. It provides "that the 1-year limit on actions for damages 'does not bar a person from asserting a violation of this subchapter in an action to collect the debt which was brought more than one year from the date of the occurrence of the violation as a matter of defense by recoupment.'" *Id.* at 417-18 (quoting 15 U.S.C. 1640(e)). Section 1640 does not define a term in Section 1635. "The quite different treatment of rescission stands in stark contrast to [the treatment of recoupment in Section 1640(e)], there being no provision for rescission as a defense that would mitigate the un-

compromising provision of § 1635(f) that the borrower's right 'shall expire' with the running of the time." *Id.* at 418.

***Bates* v. *United States*, 522 U.S. 23 (1997),** held that a statute prohibiting the misapplication of federally insured student loan funds did not require a specific intent to injure or defraud someone. The statute at issue applies to "[a]ny person who knowingly and willfully embezzles, misapplies, steals, or obtains by fraud, false statement, or forgery any funds, assets, or property provided or insured under this subchapter." 20 U.S.C. 1097(a). The court reasoned: "The text of § 1097(a) does not include an 'intent to defraud' state of mind requirement, and we ordinarily resist reading words or elements into a statute that do not appear on its face." 522 U.S. at 29.

The Court went on to explain: "In contrast, 20 U.S.C. § 1097(d), enacted at the same time as § 1097(a), makes it a felony 'knowingly and willfully' to 'destroy or conceal any record relating to the provision of assistance under [Title IV] *with intent to defraud the United States*.'" *Id.* (emphasis and alteration in original). Section 1097(d) did not define a term appearing in Section 1097(a), but rather included an independent element missing from the other section.

***United States* v. *Gonzales*, 520 U.S. 1 (1997),** held that a federal criminal sentence for carrying a firearm could not run concurrently with any other sentence, including one for a state crime. The statute provided that anyone carrying a firearm while committing "any * * * drug trafficking crime * * * for which he may be *prosecuted in a court of the United States*" shall be sentenced to five years imprisonment, and that those five years shall not "run concurrently with *any other term of imprisonment*." 18 U.S.C. 924(c)(1) (emphasis added). The Court held that the phrase "any other term of imprisonment" referred to imprisonment in state as well as federal courts, basing its holding on the ordinary meaning of the word "any": Because "the word 'any' has an expansive meaning," it must be read to refer "to all 'terms of imprisonment,' including those imposed by state courts," unless Congress "add[s] any language limiting the breadth of that word." 520 U.S. at 5.

The Court then noted that, whereas the earlier sentence in the statute referring to the court of prosecution specified a federal court, the sentence in question did not: "Given that Congress expressly limited the phrase 'any crime' to only federal crimes, we find it significant that no similar restriction modifies the phrase 'any other term of imprisonment,' which appears only two sentences later and is at issue in this case." *Id.* The earlier phrase does not define "any crime," but instead limits its scope by adding the words "for which he may be prosecuted in a court of the United States."

***Brown* v. *Gardner*, 513 U.S. 115 (1994),** held that the Department of Veterans Affairs (VA) owed disability benefits to a veteran even though the VA was not at fault for the veteran's injury. The statute required the VA to compensate a veteran for an injury that is "not the result of such veteran's own willful misconduct." 38 U.S.C. 1151. The Court found it "obvious" from the text that the VA's liability is not contingent upon its fault by pointing to "the absence from the statutory language of so much as a word about fault on the part of the VA." 513 U.S. at 117.

The Court noted that the proper outcome "is made all the more obvious by the statute's express treatment of a claimant's fault. The same sentence of § 1151 * * * restricts compensation to those whose additional disability was not the result of their 'own willful misconduct.'" 513 U.S. at 120. The words "willful misconduct" in Section 1151 do not define a term but instead supply a fault element absent from the part of the sentence concerning the VA.

***General Motors Corp.* v. *United States*, 496 U.S. 530 (1990),** held that the Environmental Protection Agency was not required to review a revision of a state implementation plan (SIP) within four months of the revision's enactment. The EPA must act within "four months after the date required for submission of a plan," 42 U.S.C. 7410(a)(2), but the Court reasoned that this section "seems to us to refer only to the action required on the original SIP * * * [and thus] by its terms, therefore does not impose such a time restraint on EPA review of a SIP revision." 496 U.S. at 536.

The Court stated that the text of Section 7410(a)(2) "suffices to dispose of petitioner's contention, but if additional support is needed, it is available." 496 U.S. at 537. Specifically, another section of the statute decreed that "with respect to certain SIP revisions for fuel-burning stationary sources, 'the Administrator shall approve or disapprove *any revision* no later than three months after its submission.'" *Id.* (quoting 42 U.S.C. 7410(a)(3)(B) (emphasis added)). Section 7410(a)(3)(B) did not define a term also found in Section 7410(a)(2), but instead included a time limit with respect to revisions that Section 7410(a)(2) did not have. "Since the statutory language does not expressly impose a 4-month deadline and Congress expressly included other deadlines in the statute, it seems likely that Congress acted intentionally in omitting the 4-month deadline in [Section 7410(a)(2)]." *Id.* at 538.

***INS* v. *Cardoza-Fonseca*, 480 U.S. 421 (1987)**, held that an alien seeking asylum need not show that she faces a "clear probability of persecution" if she returns to her native country, but merely that she has a "well-founded fear" of such persecution. Congress had instructed the Attorney General to grant asylum to any "refugee" (8 U.S.C. 1158(a)) – *viz.*, to anyone who "is unable or unwilling to return to [his or her] * * * country because of persecution or a well-founded fear of persecution" (*id.* § 1101(a)(42)). A separate section authorized the withholding of deportation if an alien's "life or freedom would be threatened" by a return (*id.* § 1253(h)) – a standard the Court interpreted as requiring a "clear probability of persecution" (480 U.S. at 430). The Government argued that a "well-founded fear" can exist only if there is a "clear probability of persecution," and thus that the two standards were identical. *Id.* The Court rejected this contention because "the language Congress used to describe the two standards conveys very different meanings. * * * The linguistic difference between the words 'well-founded fear' and 'clear probability' may be as striking as that between a subjective and an objective frame of reference." *Id.* at 430-31 (internal quotation marks omitted).

The Court added: "The different emphasis of the two standards which is so clear on the face of the statute is significantly

highlighted by the fact that the same Congress simultaneously drafted [§ 1158(a)] and amended [§ 1253(h)]. In doing so, Congress chose to maintain the old standard in [§ 1253(h)], but to incorporate a different standard in [§ 1158(a)]." *Id.* at 432. Neither section defined a term from the other; they each simply provided their own standard.

***Duncan* v. *Walker*, 533 U.S. 167 (2001)**, held that an application for federal habeas corpus review does not toll the statute of limitations under AEDPA. The relevant statute provides: "The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection." 28 U.S.C. 2244(d)(2). The respondent argued that the words "or other collateral review" included federal habeas petitions, but the court rejected this argument: "Congress placed the word 'State' before 'post-conviction or other collateral review' without specifically naming any kind of 'Federal' review." 533 U.S. at 172.

The Court supplemented its reasoning by noting: "In several other portions of AEDPA, Congress specifically used both the words 'State' and 'Federal' to denote state and federal proceedings." *Id.* One such example was Section 2254(i): "'The ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under Section 2254.'" *Id.* at 172-73. Section 2254(i) did not define any term, but merely highlighted Congress's failure in Section 2244(d)(2) to include a modifier that it had included in numerous other provisions. Moreover, "by providing a powerful incentive for litigants to exhaust all available state remedies before proceeding in the lower courts" (*id.* at 180), the construction of Section 2244(d)(2) advanced by petitioner and ultimately adopted by this Court advanced the states' interest in comity and finality.

***Hohn* v. *United States*, 524 U.S. 236 (1998)**, held that this Court had jurisdiction to review denials by the courts of appeals of applications for certificates of appealability. The relevant statute stated: "Cases in the courts of appeals may be reviewed by the Supreme Court by * * * writ of certiorari granted upon

the petition c[illegible]arty to any civi[illegible] or crimi[illegible] ca[illegible] before or after renditio[illegible]gment or decree." 28 U.[illegible](1). The Court ruled: "[illegible]n be little doubt that H[illegible] application for a certific[illegible] appealability constitutes [illegible] under § 2254[illegible]," bec[illegible]It is a proceeding seeking [illegible]or an immediate and r[illegible]ssible injury, *i.e.*, wrongful d[illegible]n in violation [illegible]ut[illegible]n." 524 U.S. at 241.

To "further refut[illegible]" the argument that it lacked [illegible]isdiction, the Court mentioned the merely "instructive" poin[illegible]hat "[t]he clear limit[illegible] this Court's jurisdiction to review de[illegible]ls of motions to file second or successive petitions by writ of certiorari contrasts with the absence of an analogous limitation to certiorari review of denials of applications for certificates of appealability." 524 U.S. at 249-50. The statute limiting second or successive petitions did not define the terms at issue; instead, it placed a direct restric[illegible]on on jurisdiction that was absent in a related statute. In fact[illegible]y refusing to apply the limiting principle articulated in Secti[illegible]2244(b)(3)(A) to bar this Court's jurisdiction in other cases, [illegible]*n* actually supports *petitioner's* contention (Pet. Br. 21) t[illegible]f anything – Congress's inclusion of the clause "by the con[illegible]ion of direct review or the [illegible]ion of the time for seeking [illegible]h review" was intended t[illegible]finality" for purposes of s[illegible]e post-conviction [illegible]e[illegible]le imposing no such limitation 'o[illegible]finality' fo[illegible]a 2255 para. 6(1).

Accordingly, there is no in[illegible]ce in wh[illegible]p-plied the *Russello* presu[illegible]s to this case.

C[illegible]

For the foregoing re[illegible]et forth in the opening brief of the p[illegible]rief for the United States, and the repl[illegible]es, the judgment of the court of ap[illegible]

Respectfully submitted,

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